

1 JOHN D. MUNDING  
2 CRUMB & MUNDING, P.S.  
3 601 W. Riverside, Suite 1950  
4 Spokane, WA 99201  
5 Telephone: (509) 624-6464  
6 Fax: (509) 624-6155  
7 Email: munding@crumb-munding.com

JUDGE WILLIAMS

8 UNITED STATES BANKRUPTCY COURT  
9 EASTERN DISTRICT OF WASHINGTON

10 THE CATHOLIC BISHOP OF  
11 SPOKANE a/k/a THE CATHOLIC  
12 DIOCESE OF SPOKANE,

Debtor.

NO. 04-08822-PCW11  
Chapter 11

13 COMMITTEE OF TORT LITIGANTS,

14 Plaintiff,

Adversary No. 05-80038-PCW

15 Vs.

16 THE CATHOLIC DIOCESE OF  
17 SPOKANE, et al.,

Defendants.

CATHEDRAL OF OUR LADY OF  
LOURDES PARISH'S OPPOSITION TO  
SUMMARY JUDGMENT

19 Cathedral of Our Lady of Lourdes and its Parishioners ("Lourdes"), in opposition to  
20 the Tort Litigant Committee's (the "Committee") Motion for Summary Judgment (Docket  
21 Nos. 63-67, 72), submits the following memorandum of law. This memorandum  
22 incorporates and is supported by the Affidavit of Monsignor James Ribble, the Affidavit of  
23 Robert Lee Hamilton, Parishioner, and Defendants' Omnibus Statement of Facts (LR  
24 7056). Lourdes also adopts and incorporates those Affidavits filed by other Defendants  
25 opposing Plaintiff's Motion.  
26

CATHEDRAL OF OUR LADY OF LOURDES PARISH'S  
OPPOSITION TO SUMMARY JUDGMENT - 1

CRUMB & MUNDING, P.S.  
SUITE 1950  
601 W. RIVERSIDE AVENUE  
SPOKANE, WA 99201  
(509) 624-6464  
FAX (509) 624-6155

I.

**RELIEF REQUESTED**

The Committee's attempt to deny Lourdes its ownership interest in real property that Lourdes paid for, improved, and uses in fulfillment of its religious tenets must be rejected. The undisputed evidence demonstrates that:

1. Neither the Committee, its members, nor the Debtor have any beneficial interest in the real property belonging to Lourdes;
2. Neither the Committee, its members, nor the Debtor have a legal basis to justify the taking of real property from Lourdes, a non-debtor; and
3. Lourdes' equitable and beneficial ownership interest in the real property is clearly established by non-bankruptcy law.

As a matter of both law and fact, the Committee's Motion for Summary Judgment/Declaratory Relief seeking to deprive Lourdes of fundamental property rights and religious freedoms must be denied.

II.

**PROCEDURAL HISTORY**

**A. The Bankruptcy**

A voluntary petition under Chapter 11 of the Bankruptcy Code was filed by the Catholic Diocese of Spokane, a corporation sole ("Debtor"), on December 6, 2004 (Petition Date). The Bankruptcy Court entered the Order for Relief, adjudicating the Diocese a Chapter 11 Debtor. Since that date, the Debtor has acted as the Debtor-in-Possession pursuant to 11 USC 1108. The Debtor duly filed and subsequently amended its Schedules and Statement of Financial Affairs. (See Main Case Docket Nos. 19, 41-42)

Within its Statement of Financial Affairs, the Debtor describes certain real property to which it holds "bare legal title." The Statement of Affairs explains that equitable/beneficial title to such real property is held by other entities, including Lourdes. This description is accurate concerning the true ownership of the real property and supported by both facts and applicable law. Neither the Debtor nor Lourdes disputes this particular trust relationship.

1 **B. Appointment of Creditors Committee**

2 On February 2, 2005, the Court entered an Order duly approving the appointment of  
3 the Committee. (Main Case Docket No. 206) The Committee consists of individuals who  
4 filed complaints against the Diocese in the Superior Court of the County of Spokane, State  
5 of Washington. Neither the Committee nor its members have asserted a claim in State  
6 Court against Lourdes or identified any legal relationship with Lourdes.

7 The legal standing of the Committee to seek declaratory relief against non-debtors in  
8 this manner is disputed and the subject of a pending motion to dismiss. (See Section II.F.)

9 **C. The Adversary**

10 On February 4, 2005, the Committee filed a three count Complaint ("Complaint") in  
11 this adversary proceeding ("Adversary Proceeding"), specifically:

- 12 • FIRST CAUSE OF ACTION  
(Declaratory Relief: The Disputed Real Property)
- 13 • SECOND CAUSE OF ACTION  
(Declaratory Relief: the Disputed Personal Property)
- 14 • THIRD CAUSE OF ACTION  
(Declaratory relief: Substantive Consolidation)  
(Docket No. 1, Complaint)

15 Although property is allegedly "disputed," the Committee does not have or assert a  
16 legal claim to or legal interest in the real or personal property. (See Complaint, pp. 13-15.)

17 The relief sought by the Committee is drafted as equitable, although it is clearly of  
18 the nature and effect of relief determining property rights of non-debtors. Specifically,

- 19 1. Declaring that the Disputed Real Property is property of the estate under 11  
20 U.S.C. § 541(a)(1) as of December 6, 2004,
- 21 2. Declaring that the Disputed Personal Property is property of the estate under  
22 11 U.S.C. § 541(a)(1) as of December 6, 2004;

1           3.       Ordering the Debtor to amend its Amended Statement of Financial Affairs and  
2 its Amended Schedules of Assets and Liabilities to reflect that the Disputed Real Property  
3 and the Disputed Personal Property are all property of the estate;

4           4.       Ordering substantive consolidation, nunc pro tunc, of the Debtor's bankruptcy  
5 estate with the [Diocese-Related Entities] effective as of December 6, 2004.

6           (Adv Complaint, p. 15)

7           By way of the Complaint, the Committee seeks to determine the property rights and  
8 interests of not only Lourdes, but of 82 non-debtors. The Complaint seeks to deprive those  
9 non-debtors of their instrumentalities used in religious worship, faithful exercise of its  
10 mission, activities, and ministries.

11 **D.     Motion for Avoidance Powers**

12           On February 7, 2004, the Committee filed a motion in the main case seeking  
13 avoidance powers. (Main Case Docket Nos. 223-224) The motion was heard on May 2,  
14 2005. The court continued hearing on this matter for an indefinite period (approximately 5  
15 to 6 months) with any counsel being able to renote this matter on 20 days notice.  
16 (Main Case Docket No. 393)

17 **E.     Motion for Summary Judgment**

18           The Committee filed the present motion for summary judgment ("Motion") on April  
19 17, 2005. (Adv. Docket No. 63)

20           The Motion seeks specific relief defining title and ownership of at least 22 separate  
21 parcels of real property which belong to at least 22 different and distinct Defendants.  
22 Although the Committee's Motion indicates that they have restricted summary judgment to  
23 their first cause of action, the Memorandum aggressively seeks a ruling on their third cause  
24 of action by way of an "alter ego" argument.

25           The Committee's Motion attempts to "lump" Lourdes' real property with other  
26 Defendants' real property interests, dealing with all parcels of property collectively,  
including all improvements and fixtures. However, each parcel of real property is a  
separate parcel of property, with separate and distinct ownership interest, and separate

1 factual circumstances surrounding each parcel's acquisition, improvement, maintenance,  
2 and use. The committee's standardized factual scenario is inapplicable and not an  
3 appropriate basis for declaratory relief against Lourdes.

4 **F. Motion to Dismiss Adversary Proceeding**

5 On May 2, 2005, the Parish Defendants filed a motion under FRBP 7012 seeking to  
6 dismiss this Adversary Proceeding on the following grounds:

7 The Committee's Complaint should be dismissed on either of two (2)  
8 separate grounds.

9 1. Nothing contained within the express language of Section  
10 521(1) or 541(a) clearly, explicitly, or unambiguously confers standing to a  
creditors committee to file suit against non-debtors to define a non-debtor's  
property rights.

11 2. The Bankruptcy Court and Federal District Court lack subject  
12 matter jurisdiction over the claims alleged in the Committee's Complaint  
13 because there is no case or controversy between the Committee and the  
Parishes within the meaning of the Declaratory Judgment Act and Article III of  
the U.S. Constitution.

14 (Docket Nos. 99-100)

15 This motion is set to be heard on June 27, 2005.

17 **III.**

18 **NON-CORE PROCEEDING**

19 The Committee asserts in its Complaint that this is a "core proceeding" under 28  
20 USC § 157(b) and 1334(b). The Parishes, based upon the declaratory nature of the relief  
21 sought in the Complaint, deny that this is a core proceeding. This action exclusively seeks  
22 declaratory relief against over 80 non-debtor defendants to determine the property rights of  
23 separate legal entities. The Complaint does not present a federal question nor is there  
diversity between the litigants.

24 The present adversary action has the effect of a defacto quiet title action as to non-  
25 debtor defendants. As such, it could have easily been brought in state Superior Court  
26 pursuant to RCW 7.28.010 et seq., regardless of whether the Debtor was in bankruptcy.

1 For purposes of this Adversary Proceeding, Lourdes does not consent to entry of  
2 Findings of Fact and Conclusions of Law and does not waive defenses related to Plaintiff's  
3 standing and failure to state a claim. (See Docket Nos. 88, 99-100.)

4  
5 **IV.**

6 **STATEMENT OF FACTS**

7 Under Canon Law, Lourdes is a separate and distinct legal entity known as a juridic  
8 person. [Canons § 113-115, § 515] Under Civil Law, Lourdes is an unincorporated  
9 association. (Committee's Statement of Undisputed Fact No. 23)

10 The Committee's exhibit for the real property owned by Lourdes is incorrect. (Stang  
11 Aff., Ex. 1 – Our Lady of Lourdes.)

12 Lourdes is one of the oldest parishes within the Spokane Diocese. Lourdes Parish  
13 was founded in 1881 and was one of the first three parishes of Spokane Falls, now known  
14 as Spokane. The real property associated with Lourdes has a deep history in downtown  
15 Spokane.

16 According to the deeds, the real property belonging to the Parish is summarized as  
17 follows:

- 18 • Lots 1-4, Block 26 and Resurvey of Addition to Spokane Falls. Purchased 12/18/01  
19 by Bishop of Nesqually. Price \$26,000.
- 20 • Lot 5, Block 26, Purchased 4/6/05 by Bishop of Nesqually. Price \$6,500.
- 21 • Lot 6, Block 26, Purchased 1/21/18 by Catholic Bishop of Spokane, subject to  
22 mortgage

23 The Committee misidentified the foregoing real property. Not title search to  
24 demonstrate title history was produced by Committee or vesting deed. Regardless, the  
25 Parish and its property pre-existed the Debtor. The property was purchased, improved, and  
26 maintained for the last one hundred years by its Parishioners through donations, gifts, and  
tithes.

Although located next to the Chancery of the Diocese, Lourdes is truly an  
independent parish with its own identity and property. The Cathedral of Our Lady of

1 Lourdes is located on the real property owned by Lourdes. Lourdes presently consists of  
2 760 regular member households. (Aff. J. Ribble, ¶¶ 4-7) Lourdes has been and is  
3 responsible for all insurance, taxes, improvements, and building projects associated with  
4 the property. (Aff. J. Ribble, ¶¶ 4-7; Aff. Hamilton, ¶¶ 3-9)

5 The money for improvements, taxes, and maintenance for the property is raised and  
6 donated by Parishioners. (Aff. J. Ribble, ¶¶ 10-11; Aff. R. Hamilton, ¶¶ 3-10)

7 Similar to other parishes, Lourdes has its own employees, maintains its own  
8 accounting system, and manages its own finances, which are derived entirely through gifts,  
9 tithes, and donations from Parishioners. (Aff. J. Ribble, ¶¶ 11-14; Aff. Hamilton, ¶¶ 5-9)

10 As part of its management of its finances, Lourdes banks in the public sector,  
11 holding several accounts at Washington Trust Bank. The funds in these accounts are  
12 derived entirely from its Parishioners and are used for the benefit of its real property and  
13 payment of operating expenses such as vendors and expenses associated with its  
14 automobile. (Aff. J. Ribble, ¶¶ 12-17)

15 Since 1881, Lourdes has been in existence as a Parish, it has raised money,  
16 improved and maintained its property, and occupied its property to the exclusion of all  
17 others.

18 Contrary to the Committee's conclusions, the facts demonstrate Lourdes is its own  
19 legal entity and is the true owner of all equitable and beneficial interest of the real property  
20 identified as "Lourdes" by the Committee.

## 21 V.

### 22 STANDARDS OF REVIEW

#### 23 A. Declaratory Judgment Standard.

24 The Committee glosses over the fact that the relief it seeks is entirely declaratory in  
25 nature. A declaratory judgment action is ripe for adjudication only where an "actual  
26 controversy" exists. Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5<sup>th</sup> Cir. 2000).  
"As a general rule, an actual controversy exists where 'a substantial controversy of  
sufficient immediacy and realty [exists] between parties having adverse legal interests.'"



1 Id., citing Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5<sup>th</sup> Cir.  
2 1986).

3 Although some Bankruptcy Courts have entertained declaratory judgment actions  
4 filed by trustees when the ownership interest of an asset was in dispute which the trustee  
5 asserted was property of the estate on the petition date, the present case is not advanced  
6 by a trustee or Debtor-in-Possession. See In re Challenge Air Int'l. Inc., 952 F.2d 384 (11<sup>th</sup>  
7 Cir. 1992); In re Taylor & Campaigne, Inc., 157 B.R. 493 (Bankr. M.D. Fla. 1993); Bottom v.  
8 Bottom, 176 B.R. 950 (Bankr. N.D. Fla. 1994); In re Ocean Beach Club, Inc., 79 B.R. 505  
(Bankr. S.D. Fla. 1987).

9 There is no legal relationship between Lourdes, the Committee, or any Committee  
10 members. Furthermore, there is no legal dispute between Lourdes and the Debtor  
11 regarding the ownership interests in real property or trust relationship between the Debtor  
12 and Lourdes. It is correctly described and defined in the Debtor's Statement of Affairs in  
13 accordance with the relationship between the parties as established by Canon Law and  
14 Civil Law. As such, no actual controversy between parties with adverse legal interests  
15 exists.

#### 16 **B. Summary Judgment Standard.**

17 The party moving for summary judgment has the burden to show that he is entitled  
18 to judgment under established principles; and if he does not discharge that burden, he is  
19 not entitled to judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 26, L.Ed.2d 142,  
90 S. Ct. 1598 (1970).

20 In determining whether there are any genuine issues of material fact, the Court must  
21 view the evidence in the light most favorable to the nonmoving party. Summers v. A.  
22 Teichert & Son, Inc., 127 F.3d 1150, 1152 (9<sup>th</sup> Cir. 1997). The party opposing summary  
23 judgment to survive the motion need only present evidence from which a jury might return a  
24 verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. Id. at  
1039, citing Anderson v. Liberty Lobby, Inc.

25 The Committee has failed to produce any evidence to support its contention that the  
26 beneficial and equitable ownership of the real property does not belong to Lourdes.



1 However, Lourdes has not only produced reasonable evidence as to a material issue  
2 of fact as to its ownership interest in the real property, it has also produced overwhelming  
3 evidence that Lourdes is the true owner of the real property in question.

## 4 VI.

### 5 LEGAL ANALYSIS PREVENTING DECLARATORY RELIEF 6 CONCERNING REAL PROPERTY OWNERSHIP

#### 7 8 A. Whether Applying Civil Law Or Canon Law, Lourdes Parish Is A 9 Separate And Distinct Legal Entity.

10 The Committee has conceded that Parishes are unincorporated associations.  
11 (See, Committee Statement of Undisputed Fact No. 23) The Committee's  
12 acknowledgment of Lourdes' status as a separate legal entity from the Debtor is  
13 consistent with both Civil and Canon Law.

#### 14 1. Washington Law Recognizes Lourdes As A Legal Entity.

15 The Parish, as an unincorporated association, is a separate legal entity under  
16 Washington law. A Parish consists of its Christian faithful. (Canon 515(1)) The Christian  
17 faithful ("Parishioners") of each Parish are the residents of their local community. They are  
18 residents of cities, towns, and counties within Eastern Washington, in some cases they are  
19 members of sovereign Indian tribes. The Parishioners are the epitome of a voluntary group  
20 pursuing a common purpose. In the case of each parish, the common purpose is the  
21 fulfillment of their religious tenets.

22 An "unincorporated association" is defined as "[a] [v]oluntary group of persons,  
23 without a charter, formed by mutual consent for the purpose of promoting common  
24 enterprise or prosecuting common objective. An organization composed of a body of  
25 persons united with a charter for the prosecution of a common enterprise." *Black's Law*  
26 *Dictionary*, 1531 (6<sup>th</sup> 1991). This is a broad definition, and Washington has recognized that  
"associations vary in their nature." *Riss v. Angel*, 131 Wn.2d 612, 635 (1997).  
Washington's case law recognizes a variety of forms of unincorporated associations,

1 including groups of individuals of a particular religion or creed. See Bacon v. Gardner, 38  
2 Wn.2d 299 (1951), Church of Christ v. Carder, 105 Wn.2d 204 (1986).

3 Unincorporated associations clearly have the ability to hold the equitable interests of  
4 a trust and defend that interest in court. Leslie v. Midgate Center, Inc., 72 Wn.2d 977  
5 (1967). Washington has repeatedly acknowledged the legal capacity of unincorporated  
6 associations to be parties to lawsuits. Bacon v. Gardner, 38 Wn.2d 299, 304 (1951); State  
7 v. Bothell, 89 Wn.2d 862, 866 (1978); see also Church of Christ v. Carder, 105 Wn.2d 204,  
8 206 (1986); Riss, 131 Wn.2d 612 (1997). By statute, unincorporated associations have the  
9 capacity to appear and represent their interests in declaratory judgment actions. RCW §§  
10 7.24.110 - .130 (West 2005). It is well settled law that unincorporated associations have  
11 the ability to represent the interests of their members in legal actions. See, State v. Bothell,  
12 89 Wn.2d at 866.

13 It is important to note that not a single case quoted by the Committee in support of  
14 its assertion that each Parish is not a legal entity is from the state of Washington.  
15 Bankruptcy Rule 7017 incorporates Rule 17(b), Fed. R. Civ. P., as follows:

16 The capacity of an individual, other than one acting in a representative  
17 capacity, to sue or be sued shall be determined by the law of the individual's  
18 domicile. The capacity of a corporation to sue or be sued shall be determined  
19 by the law under which it was organized. In all other cases capacity to sue or  
20 be sued shall be determined by the law of the state in which the district court  
21 is held . . . .

22 As a matter of law, unincorporated associations can be sued under Washington law.  
23 The various cases cited by the Committee have no precedential value here in Washington.  
24 The Committee's argument that Lourdes does not have a legal existence separate from the  
25 Diocese fails as a matter of law. It is also inconsistent with Committee's Statement of  
26 Undisputed Fact No. 23.

## 2. Lourdes Is A Separate Legal Entity Under Canon Law.

27 The Law of the Roman Catholic Church ("Church") has been in existence since the  
28 first century. Presently, the Church is governed by the 1983 Code of Canon Law. To the  
29 extent the resolution of this matter requires a determination of the relationship between the

1 Debtor and Lourdes in their methods of governance, interaction or management,  
2 compulsory deference is required to the provisions of the Code of the Canon Law which  
3 govern these religious organizations under applicable law. The Supreme Court, when  
4 faced with issues involving the Roman Catholic Church, has stated:

5 In the absence of fraud, collusion or arbitrariness, the decisions of proper  
6 church tribunals on matters purely ecclesiastical, although affecting civil  
7 rights, are accepted in litigation before the secular courts as conclusive,  
8 because the parties in interest made them so by contract or otherwise. Under  
9 like circumstances, effect is given in the courts to the determination of the  
10 judiciary bodies established by clubs and civil associations.

11 Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17, \_\_\_ S.Ct. \_\_\_, 74 L.Ed.131,  
12 137 (1929) (citing Watson v. Jones, 13 WALL 676, 20 L.Ed. 666 (\_\_\_)).

13 This legal principle has been clearly adopted by the Washington State Supreme  
14 Court, when addressing real property interests involving a hierarchal church. See,  
15 Wilkerson v. Rector, etc., St. Luke Parish, 176 Wash. 377 (1934); See also, Church of  
16 Christ v. Carder, 105 Wn.2d 204 (1986); Southside Tabernacle v. Church of God, 32 Wash.  
17 App. 814 (1982) (All applying the compulsory deference rule established in Watson to  
18 disputes involving church property.)

19 In this case, the identity of the Parish, the Parishioners, the Debtor, and their  
20 relationship to their property rights are defined within Canon Law. These relationships, are  
21 "purely ecclesiastical, though affecting civil rights, [and] are [to be] accepted in litigation  
22 before secular courts as conclusive[.]" Gonzalez, 280 U.S. at 16, \_\_\_ S.Ct. at \_\_\_, 74 L.Ed.  
23 at 137.

24 Within the Church, besides physical persons, there are also juridic persons, that is,  
25 subjects in Canon Law of obligations and rights which correspond to their nature. (Canon  
26 113(2)) A juridic person is an artificial person distinct from all natural persons or material  
goods. Like a civil law corporation, it is a legal entity which can and must be conceived  
apart from the natural persons who constitute it, administer it, or for whose benefit it exists.  
See L. Chiappetta, Il Codice di Diritto Canonico: Commento Giuridico-Pastorale, 2<sup>nd</sup> ed.  
(Rome: Dehoniane, 1996) 1:169; Robert Kennedy, New Commentary on the Code of  
Canon Law (Paulist Press 2000).

1 Canon Law provides that:

2 A parish is a certain community of the Christian faithful stably constituted in a  
3 particular church, whose pastoral care is entrusted to a pastor as its proper  
4 pastor under the authority of a diocesan bishop. (Canon 515(1))

5 Canon 515(3) states:

6 A legitimately erected parish possesses juridic personality by the law itself.  
7 (Canon 515(3))

8 In this case, there is no dispute that Lourdes is a legitimately erected Parish and a  
9 juridic person under Canon Law.

10 Canon Law is clear that property acquired by a Parish belongs to the Parish.  
11 Specifically, Canon 1256 states:

12 Under the supreme authority of the Roman Pontiff, ownership of goods  
13 belongs to that juridic person which has acquired them legitimately. (Canon §  
14 1256)

15 Since its inception, the Christian faithful themselves, which constitute the Parish,  
16 have acquired both real and personal property which is used by the Christian faithful in their  
17 fulfillment of their religious tenets. Under Canon Law, the property was acquired by, used  
18 by, improved, maintained, and owned by each Parish independently. (Canons 1257-1272)  
19 The juridic person (Parish) may not be deprived of its property without consent and  
20 approval. (See Canons 1281–1288 and 1291-1295)

### 21 **3. Committee Waived Argument on Individual Parish Standing.**

22 The Committee's decision to name and sue Lourdes and 81 other Parishes  
23 individually is evidence of the separate legal identity of each parish. Furthermore, the  
24 Committee admits that Lourdes is a separate unincorporated association in its Statement of  
25 undisputed Facts. (CSF No. 23) The doctrine of judicial estoppel prevents a party from  
26 taking divergent positions in different legal proceedings. Wagner v. Proff Engineers in  
California Court, 354 F.3d 1036, 1044 (9<sup>th</sup> Cir. 2004).

1 In addition, the request for relief in the Complaint seeks substantive consolidation of  
2 Lourdes with the Debtor. Substantive consolidation in bankruptcy terms is the  
3 consolidation of a non-debtor entity with a separate debtor entity. (See Alexander, 229  
4 F.3d 750 (9<sup>th</sup> Cir. 2000)) As such, the Committee has already recognized the legal identity  
5 of Lourdes is separate and apart from the Debtor. The Committee should be estopped  
6 from taking a contrary position for purposes of its Motion.

7 **4. Judicial Estoppel Does Not Apply to Lourdes.**

8 Lourdes does not dispute the definition of judicial estoppel submitted by the  
9 Committee which is designed to prevent a party from taking divergent positions in different  
10 legal proceedings. See the Committee's Memorandum at p. 18, citing Wagner v. Prof.  
11 Engineers in California Gov't, 354 F.3d 1036, 1044 (9<sup>th</sup> Cir. 2004). However, the  
12 Committee fails to present a full recitation of the elements required for a finding of judicial  
13 estoppel, and it is in those elements that the Committee's position is revealed to be flawed.

14 The United States Supreme Court recently listed three factors that  
15 courts may consider in determining whether to apply the doctrine of judicial  
16 estoppel:

17 First, a party's later position must be "clearly inconsistent" with its  
18 earlier position. Second, courts regularly inquire whether the party has  
19 succeeded in persuading a court to accept that party's earlier position, so that  
20 judicial acceptance of an inconsistent position in a later proceeding would  
21 create "the perception that either the first or the second court was misled[.]"  
22 Absent success in a prior proceeding, a party's later inconsistent position  
23 introduces no "risk of inconsistent court determinations," and thus no threat to  
24 judicial integrity. A third consideration is whether the party seeking to assert  
25 an inconsistent position would derive an unfair advantage or impose an unfair  
26 detriment on the opposing party if not estopped. In enumerating these  
factors, we do not establish inflexible prerequisites or an exhaustive formula  
for determining the applicability of judicial estoppel. Additional considerations  
may inform the doctrine's application in specific factual contexts.

23 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-783 (9<sup>th</sup> Cir. 2001), citing New  
24 Hampshire v. Maine, 121 S. Ct. 1808, 1815 (2001) (internal citations omitted). The  
25 application of judicial estoppel is appropriate to bar litigants from making incompatible  
26

1 statements in two different cases. Risetto v. Plumbers & Steamers Local 343, 94 F 3d 597,  
2 605 (9<sup>th</sup> Cir. 1996).

3 The position taken by Lourdes is not inconsistent with the holding of the cases cited  
4 by the Committee. In Munns v. Martin, 131 Wn. 2d 192, 196 (1977) (*en banc*), the case  
5 was actually filed by the individual members of St. Patrick's Parishioners and Friends of  
6 Historic Preservation. Of the seven members, six were members of the Parish. Id. at 196.  
7 The issue arose when the "St. Patrick Building Committee," a parish committee, applied for  
8 a demolition permit related to St. Patrick School. This was a case of historic preservation  
9 interests vs. parish building committee interests, Parishioner v. Parishioner. Id. at 194-199.  
10 The case holding invalidated a statute that was being used by a non-parishioner in an  
11 attempt to stop a building project advanced by a parish building committee for the  
12 furtherance of the Church's fundamental right to exercise religion. The ordinance was  
13 found to have a coercive effect on the practice of religion.

14 The second case, Miller v. Catholic Bishop of Spokane, 2004 WL 2074328 (Wash.  
15 App. 2004), is an unpublished decision. As a matter of law, this opinion should not have  
16 been cited. "[U]npublished opinions of the Court of Appeals will not be considered in the  
17 Court of Appeals and should not be considered in the trial courts. They do not become a  
18 part of the common law of Washington." State v. Fitzpatrick, 5 Wn. App. 661, 668  
19 (1971)(emphasis added).

20 Regardless, in Miller, the Catholic Bishop of Spokane was sued for damages based  
21 upon the plaintiff's fall from a loft opening. The Bishop defended the action based on its  
22 ownership of the property, which was the Parish Hall of Sacred Heart Catholic Church in  
23 Springdale, Washington. However, this is not a position that is "clearly inconsistent" with  
24 the current position taken by the Diocese and the Parishes. There is no assertion or  
25 indication as to the nature of the Bishop's ownership interest. In this bankruptcy case, the  
26 Diocese and the Parishes assert that the Diocese holds an ownership interest in the  
property, but holds that interest in trust for the Parishes. This is not an inconsistent  
position. Rather, the ownership status of the Bishop in Miller was never addressed or  
litigated. Further, the Bishop did not "succeed in persuading a court to accept that party's  
earlier position" because the **nature** of the Bishop's ownership interest was never at issue.



1 Therefore the current position, which is consistent with the prior position, introduces no risk  
2 of inconsistent court determinations.

3  
4 **5. The Committee's Reliance Upon F.E.L. Publication, Ltd. v. The Catholic**  
5 **Bishop of Chicago and Oregon Case Law is Misplaced.**

6 First, both Oregon and Illinois apply a neutral principle of law approach to church  
7 property issues. When examining church property disputes, Washington applies the more  
8 stringent approach of compulsory deference. Furthermore, the legislative histories and  
9 governing statutes concerning corporate soles is much different than that of Washington.

10 F.E.L. Publications was a seventh circuit case which decided the issue on the legal  
11 relationship between the Diocese and the Parishes within it in order to resolve a claim  
12 against the diocese for tortious interference with a business relationship. There the Court  
13 held that it was impossible for the cause of action to be based on the Diocese's directives  
14 to the Parishes as those Parishes had no independent status, and were in fact "subsumed  
15 under the Catholic Church." F.E.L., 754 F.2d at 221. In concluding this, the court relied  
16 primarily upon Illinois case law, and in particular Haymes v. Catholic Bishop of Chicago, 41  
17 Ill.2d 336 (1968), Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400 (1919)  
18 and Galich v. Catholic Bishop of Chicago 75 Ill App.3d 538 (1979). The case primarily  
19 relied upon was Galich, however, that issue was not before the court in Galich.

20 In Galich, the Court held that the statute under which the Bishop of Chicago  
21 incorporated did not create a statutory trust for the benefit of the Parishioners bringing the  
22 case. Further, the Court held that any determination of the ability or inability of the Bishop  
23 to demolish a church would violate the First Amendment.

24 The statute under which the case was decided was subsequently amended. As  
25 amended, it includes a great deal of language indicating a legislative intent to create a trust  
26 for the benefit of the religious congregation for whom the corporation is formed.

The other cases relied upon by the F.E.L. Court only support its conclusion by  
inference. In Haymes, the Catholic Bishop of Chicago was named the defendant in a slip  
and fall case at a Catholic school. While the issue was not addressed by the Court in  
Haymes, the implication is that the Catholic school could not have been the proper



1 defendant. In Village of Palos Park, the Catholic Bishop of Chicago essentially challenged  
2 the validity of a local zoning ordinance precluding the creation of a cemetery in the space  
3 the Catholic Bishop wished to make one. Again, only by the inference that the Catholic  
4 Bishop was the only party which could have brought the action does this case support the  
5 conclusion reached by the F.E.L. Court.

6 **B. The Bankruptcy Estate Of The Diocese Does Not Have An Interest In The Real**  
7 **Property At Issue.**

8 The Committee argues in its Complaint and subsequent Motion that by virtue of its  
9 interpretation of law and facts that Lourdes' real and personal property is property of the  
10 Debtor's bankruptcy estate. However, this argument is not substantiated. Section 541 of  
11 the Bankruptcy Code specifically excludes from the estate property to which the Debtor  
12 holds legal title, but has no equitable or beneficial interest. (See 11 U.S.C. § 541(b), (c),  
13 and (d))

14 The concept of trust relationships, bare legal title, and beneficial/equitable ownership  
15 of property is not new to bankruptcy courts. Courts have repeatedly held that when a debtor  
16 holds mere legal title to property and a non-debtor holds the beneficial or equitable  
17 ownership of that property, said property is not property of the estate. See Matter of  
18 Torrez, 63 BR 751, 754-55 (9<sup>th</sup> Cir. BAP 1986)(imposition of resulting trust appropriate  
19 since title was only put in children's name to avoid certain restrictions in a government  
20 program); Sale of Guar. Corp, 220 BR 660, 664 (9<sup>th</sup> Cir. BAP 1998)(where the transferee of  
21 property does not pay the purchase price for the property, the transferee is presumed to  
22 hold the property in a resulting trust for the party who paid the consideration for its  
23 purchase).

24 The standard of inquiry under section of the Bankruptcy Code excluding from  
25 property of the estate trust interests that are subject to transfer restrictions enforceable  
26 under applicable non-bankruptcy law, normally has three parts:

- 24 (1) whether the debtor has a beneficial interest in a trust;
- 25 (2) whether there is a restriction on the transfer of that interest; and
- 26 (3) whether the restriction is enforceable under non-bankruptcy law.

1 In re Wilcox, 233 F.3d 899 (6<sup>th</sup> Cir. 2000)

2 The evaluation of each element is resolved in accordance with and through the  
3 application of state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d  
4 136, 141-42 (1979).

5 Washington law clearly establishes that the Debtor holds only "bare legal title" to the  
6 property in question. Lourdes is the true beneficial and equitable ownership of the real  
7 property in dispute.

8 **1. Lourdes Parish Is The Beneficiary Of A Statutory Trust, Holding All**  
9 **Equitable And Beneficial Interest In The Real Property.**

10 The corporation sole statute in Washington clearly and explicitly creates a statutory  
11 trust comprised of the disputed property held for the benefit of the Church and its  
12 parishioners. RCW Ch. 24.12. The Debtor incorporated under this chapter in 1915.

13 The legislative history is absolutely clear that the statute was enacted to create a  
14 trust relationship. The bill, as introduced in the Senate by two Spokane Senators, was  
15 entitled:

16 An Act providing for the organization of corporations sole, defining their  
17 powers, authorizing them to transact business and hold property in trust for  
18 religious denominations societies or churches.

19 S.B. 188 (Journal of Senate, 1915, p. 283) (emphasis added). After its introduction,  
20 it was referred to the Senate Committee on Corporations other than Municipal. Id. After  
21 review by the Committee, recommended that the bill be passed the Senate on March 6,  
22 1915.

23 The bill was subsequently passed by the house on March 10, 1915, and was  
24 approved by the Governor March 15, 1915.

25 The passed Senate Bill 188 became Session Law, Chapter 79. "Organizations and  
26 Powers of Corporations Sole."

Section 3 specifically states:

... Provided, all property held in such official capacity by such bishop,  
overseer or presiding elder, as the case may be, shall be in trust for the use,  
purpose, benefit, and behoof of his religious denomination, society or church.

1  
2 S.B. 188 (Session Laws, 1915, Chapter 79, p. 254)

3 As a corporation sole, the Debtor has the power to contract, sue, and be sued in  
4 court. R.C.W. § 24.12.020 (West 2005). A corporation sole also has the power to deal in  
5 real and personal property in the same manner as any natural person. Id. This grant of  
6 legal capacity is explicitly for the benefit of the trust created under this chapter. Id. The  
7 trust is comprised of all the property held by the Debtor in its official capacity. RCW §  
8 24.12.030 (West 2005). Specifically the statutes state:

9 ...All property held in such official capacity by such bishop, overseer or  
10 presiding elder as the case may be, shall be in trust for the use, purpose,  
11 benefit and behoof of his religious denomination, society or church.

12 RCW § 24.12.030 (West 2005).

13 Every corporation sole shall, for the purpose of the trust, have the power to  
14 contract in the same manner and to the same extent as a natural person, and  
15 may sue and be sued, and may defend in all courts and places, in all matters  
16 and proceedings whatever, and shall have authority to borrow money and  
17 give promissory notes therefor, and to secure the payment of the same by  
18 mortgage or other lien upon property, real and personal, ...

19 RCW § 24.12.020 (West 2005)(emphasis added). This statute defines the legal  
20 relationship between the Debtor, Lourdes, and Parishioners as a relationship of trustee and  
21 beneficiary. See, RCW § 24.12.030 (West 2005). This is also consistent with the norms of  
22 Canon Law which provide that each parish is a Church capable of acquiring and owning  
23 real and personal property interests.

24 Despite this clear statute and governing principles of Canon Law, the Committee  
25 misconstrues Washington case law explicitly recognizing the restrictions existing on  
26 property impressed with a trust by dedication to religious organizations for the benefit of  
such organizations. In Wilkeson v. Rector, etc. St. Luke's Parish, 176 Wash. 377, 386  
(1943), cited by the Committee, the Court explicitly notes that while the alienation of the  
property in that case was within the power of the trustee, the use of the proceeds from the  
sale could not be diverted from the benefit of the religious purposes for which the property  
was donated. Wilkeson, 176 Wash. at 385. ("In passing, it may be conceded that, if the  
purpose of respondents was to divert the funds to be received from the sale of the property

1 to other than religious purposes of the Episcopal Church, the court could and would enjoin  
2 them. The trustee is merely the holder of the legal title.”) Even the court’s explicit holding,  
3 quoted only in part by the Committee, recognizes that courts will ensure that property of a  
4 trust which is held to benefit a religious society cannot lawfully be diverted from the purpose  
5 for which the trust is held. Id. at 386. Specifically, the court stated: “For in a trust of the  
6 character involved here, where no restraint is imposed on the right to alienate, the courts  
7 will not interfere further than to see to it that the proceeds from the sale of the trust property  
8 are not diverted from the use for religious purposes of the faith or denomination to which  
9 the property was dedicated.” Id. (emphasis added).

10 Despite the Committee’s assertion that “[t]he corporation sole statute’s ‘trust’ for the  
11 Church is no different than the trust in Wilkeson...” (Committee’s Memo, p. 11) the  
12 Committee disregards the court’s explicit statements upholding restrictions on the use of  
13 the trust res and its proceeds, and identifying that “[t]he trustee is merely the holder of the  
14 legal title.” Id. at 385. The Committee’s memorandum repeatedly fails to distinguish  
15 between the rights and obligations of a trustee as the legal title holder of property, and the  
16 existence of an equitable interest in the property, attempting instead, to equate the holding  
17 of legal title by the Catholic Bishop of Spokane with the absence of the existence of a trust.  
18 This merely evidences a lack of recognition of the distinction between legal title and an  
19 equitable interest, and does not support the Committee’s argument that no trust exists.

20 The Catholic Bishop of Spokane is the trustee of the statutory trust created under  
21 RCW chapter 24.12. Whether or not, as trustee, the Catholic Bishop of Spokane has the  
22 power to alienate certain property of the trust, any such alienation must be for the “benefit  
23 and behoof of his religious denomination, society or church.” RCW § 24.12.030 (West  
24 2005). With regard to “proceeds from the sale of the trust property,” they “are not to be  
25 diverted from the use for religious purposes of the faith or denomination.” Wilkeson, 176  
26 Wash. at 386. The statutory trust under which the property is held reserves the beneficial  
use of the property for Lourdes.

1           **2.       Lourdes Is The Beneficiary Of An Express Trust.**

2           The recognition and observance of the civil duties of a trustee have been impressed  
3 upon the Debtor since its incorporation. The Catholic Bishop of Spokane was incorporated  
4 as a corporation sole under the foregoing statute on July 3, 1915. With respect to Lourdes  
5 Parish, this trust relationship commenced with the formation of the Parish. The Washington  
6 Supreme Courts has noted that statements in articles of incorporation can be sufficient to  
7 create an express trust. Hoffman v. Tieton View Methodist Church, 33 Wn.2d at 727  
8 (1949) ("There is no question in our minds but that all property acquired by Tieton View  
9 was, under article VIII of its articles of incorporation ... held in trust for the uses of the  
10 Methodist Church...").

11           The articles of incorporation clearly express the intent of creating and maintaining a  
12 trust for the benefit of the members of the Roman Catholic faith. Specifically, the articles  
13 expressly provide:

14                               **ARTICLE III**

15           This corporation is formed for the purpose of transacting business and  
16 **holding property in trust** for that certain religious denomination or society  
17 known as the Roman Catholic Church; to do business and contract in the  
18 same manner and to the same extent as a natural person; to borrow money  
19 and give promissory notes therefor, and to secure the payment of the same  
20 by mortgage or other lien upon property real and personal; to buy, sell, lease,  
21 mortgage, and in every way use and deal in real and personal property and to  
22 receive bequests for its own use or upon trusts.

23                               **ARTICLE IV**

24           The incorporator of this corporation is Augustine F. Schinner, who is the duly  
25 appointed, qualified and acting Roman Catholic Bishop of the Diocese of  
26 Spokane, in the state of Washington, and who as such Bishop of the Roman  
Catholic Church has subscribed these Articles of Incorporation, in order to  
become a corporation sole, together with his successors in office by his  
official designation, in the manner prescribe in "An Act Providing for the  
Organization of Corporations Sole, Defining Their Powers, **Authorizing them**  
**to transact business and hold property in trust for religious**  
**denominations, societies or churches.**" passed by the Legislature of the  
State of Washington and approved by the Governor, March 15th, 1915.

**ARTICLE V.**

          This incorporation is a religious corporation, not organized for gain and is  
without capital stock, **all property held by it being in trust** for the use,  
purpose, benefit and behoof of the Roman Catholic Church of the Diocese of  
Spokane, in the State of Washington.

1  
2 (Articles of Incorporation, 713115, Emphasis Added)

3 An express trust “arises because of the expressed intent and involves a fiduciary  
4 relationship in which the trustee holds property for the benefit of a third party.” Goodman v.  
5 Goodman, 128 Wn.2d 366, 372 (1995). Ninety years ago, the Bishop of Spokane clearly  
6 expressed the intent to hold property in trust for the benefit of the Parishes of the Church of  
the Diocese of Spokane.

7 A trust will be found to exist if there is a clear manifestation of an intent to create a  
8 trust, and the entire instrument, as well as its general purpose and scope, should be  
9 considered, and the instrument should be construed in light of the circumstances  
10 surrounding its execution. See, Hoffman v. Tieton View Meth. Ch., 33 Wn.2d 717, 726  
(1949).

11 In this case, the trust instrument consists of the deed, which contains explicit  
12 language referencing the fact title is held by a “Corporation Sole.” The statute governing  
13 corporation soles, RCW 24.12 et seq., clearly puts others on notice that a trust relationship  
14 exists.

15 Just as use and occupancy of property is sufficient to place others on notice of the  
16 possessor’s interest, (Miebach v. Colasurdo, 102 Wn.2d 170, 173, 177 (1984)) and the  
17 failure of a spouse to record an interest in community property does not preclude that  
18 spouse from defending that interest in court, (Campbell v. Sandy, 190 Wash. 528, 531  
19 (1937)), the use, improvement and maintenance by Lourdes of property recorded in the  
20 name of a corporation sole, places the world on notice of the statutory trust under which it  
21 is held, and identifies the true nature of the Debtor’s interest in the property. Cf. In re  
22 Country Club Market, 175 B.R. 1005, 1009 (D. Minn. 1994) (finding a valid statutory trust,  
23 and noting that such a finding creates no burden on creditors “[a]s opposed to contractual  
24 or implied trusts, the statute is public. There is no secret agreement between” the parties.).  
25  
26



1           **1. Statute Of Frauds Does Not Make The Express Trust In This Case**  
2           **Defective.**

3           Generally, the statute of frauds will prevent parol evidence from enforcing the terms  
4 of an oral trust absent fraud or other circumstances. In re Marriage of Lutz, 74 Wn. App.  
5 356, 365 (1994). An exception to the requirement for an express trust over real property is  
6 a situation where a beneficiary of the trust has partially performed in accordance with the  
7 trust. Diel v. Beekman, 7 Wn. App. 139, 144 (1972), overruled on other grounds, Choplin v.  
8 Sanders, 100 Wn.2d 853 (1984).

9           The standard for evaluating partial performance is whether the beneficiary, with the  
10 consent of the trustee:

- 11           a. Enters into possession of the land;
- 12           b. Makes improvements to the land; and
- 13           c. Changes position in reliance of the trust.

14           See, Diel at 144-145.

15           As demonstrated in the Statement of Facts in this Memorandum (Section IV),  
16 Lourdes and its parishioners have held possession of the property to the exclusion of all  
17 others since it was established. Lourdes has made all improvements to the land and  
18 maintained the structures thereon. All donations have been received with the  
19 understanding that Lourdes improved the real property to fulfill religious tenets of the  
20 Parish. Such actions were taken with the understanding the Church property was property  
21 belonging to Lourdes.

22           **C. The Committee Ignores Statutory Restriction On Institutional Funds.**

23           The Committee's discussion of the administrative dissolution of nonprofit  
24 corporations is wholly irrelevant to the enforceability of the restrictions placed on property  
25 donated to Lourdes under Washington law. This is not an instance of an administrative  
26 dissolution by the state, but a reorganization under Title 11 of the United States Code.  
Further, Lourdes is subject to the Uniform Management of Institutional Funds Act, RCW  
Chapter 24.44, which provides only two methods for the release of a restriction placed on  
donations. RCW § 24.44.060.



1 Under Washington law, donations given with restrictions as to their use, to  
2 incorporated or **unincorporated organizations operated for religious**, educational, or  
3 other eleemosynary purposes, can only be used in accordance with the restrictions unless  
4 (1) the donor gives written consent releasing the restriction, or (2) an order is obtained in  
5 Superior Court upon a finding that the restriction is (i) obsolete, (ii) inappropriate, or (iii)  
6 impracticable. R.C.W. § 24.22.060. Further, the statute requires that the Attorney General  
7 be given notice and opportunity to be heard on any such matter before the Superior Court  
8 makes its findings, and expressly retains the application of the judicial doctrine of *cy pres*.  
9 *Id.* Contrary to the claim's of the Committee, Washington's Legislature and Judiciary have  
10 a long and well established tradition of honoring the intention of the donors and benefactors  
11 of religious organizations.

12 The facts of this case demonstrate that the real property at issue was paid for with  
13 donated funds, improved, and maintained with donated funds for the benefit of Lourdes.

14 **D. If The Court Concludes That A Statutory Trust Or An Express Trust Does Not  
15 Exist, A Resulting Trust Should Be Found In Favor Of Lourdes.**

16 Even if the statutory and express trusts are found to be ineffective, the acquisition  
17 the property in dispute clearly gives rise to a resulting trust. "It is well settled that where  
18 property is taken in the name of a grantee other than the person advancing the  
19 consideration, the one in whose name title is taken is a resulting trustee for the person who  
20 paid the purchase price, in the absence of proof of a contrary intention." Mading v.  
21 McPhaden, 50 Wn.2d 48, 53 (1957). "That grantee is presumed to hold legal title subject to  
22 the equitable ownership of the person advancing the consideration." Stocker v. Stocker, 74  
23 Wn. App. 1, 6 (1994) (quoting, Thor v. McDearmid, 63 Wn. App. 193, 206 (1991)).  
24 "Similarly, where property is transferred to one person and the purchase price is advanced  
25 by him as a loan to another, a resulting trust arises in the latter's favor." Mading, 50 Wn.2d  
26 at 54. Resulting trusts are equitable in nature, and may be established by parole evidence  
of a clear, cogent and convincing nature. Stocker, 74 Wn. App. at 6. As evidenced at  
Section IV – Statement of Facts – all acquisitions of real and personal property, all  
improvements, and all maintenance of the property was paid for with money directly

1 traceable to parishioners, for the benefit of Parishioners, with the clear understanding and  
2 intent that it was for the benefit of Parish property. Just as in the case of Matter v. Torrez,  
3 63 BR 751, 754-755 (9<sup>th</sup> Cir. BAP 1986), the imposition of a resulting trust is appropriate  
4 since title was placed in the name of the corporation sole with the understanding it was held  
5 in trust for Lourdes. The Bishop never intended to actually own the property or assert  
6 control over the property or improvements as exclusive owner.

7 **E. If The Diocese Is Forced To Breach Its Fiduciary Duty And Trust Relationship**  
8 **owed to Lourdes, A Constructive Trust Must Be Imposed.**

9 The facts surrounding the nature of the relationship between the Debtor, Lourdes,  
10 and the acquisition of the property establish a constructive trust for the benefit of Lourdes.  
11 "A constructive trust is an equitable remedy which arises when the person holding title to  
12 property has an equitable duty to convey it to another on the grounds that they would be  
13 unjustly enriched if permitted to retain it." Lakewood v. Pierce County, 144 Wn.2d 118, 126  
14 (2001). A constructive trust will be "imposed when there is clear, cogent and convincing  
15 evidence of the basis for impressing the trust." Id. To establish a constructive trust, a "party  
16 must show the trust arose from the relationship of the parties involved, and that the  
17 property justly belongs to that party." Id. at 129. Here, the intent of the parties was to  
18 create valid statutory and express trusts, the beneficial use of the property was at all times  
19 held reserved by and for Lourdes. Not only is there clear, cogent and convincing evidence  
20 for the imposition of a trust, but for the Court to hold that the property in dispute belongs to  
21 the Debtor would unjustly enrich the Debtor to the detriment of Lourdes who has relied on  
22 its ownership of the property since the parish was founded.

23 **F. The Committee's Catch All Argument Of "Alter Ego" Fails As A Matter Of Law**  
24 **And Fact.**

25 The "Alter Ego" theory advanced by the Committee is merely a disguised attempt to  
26 circumvent legal deficiencies in its third claim for relief of substantive consolidation. In this  
case, the Committee is asking the Court to rule that Lourdes is liable for the debts of the

Debtor, a corporation sole, even though Lourdes is a separate legal entity and is clearly not a "shareholder" of the Debtor.

When Washington Courts invoke "piercing the corporate veil", they have applied the "doctrine of corporate disregard" based upon two elements:

a. "The corporate form must be intentionally used to violate or evade a duty,"  
and

b. "Disregard must be necessary and required to prevent unjustified loss to the injured party."

See, Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d 689 (1982)

The first factor requires a showing of abuse of the corporate form, typically involving fraud, misrepresentation, or other action **by the corporation that harms the creditor and benefits the shareholder**. The second factor requires that the harm must actually occur. In this case, the Committee has neither plead nor demonstrated any facts to support both requirements of an "Alter Ego Claim."

The undisputed facts offered by Lourdes demonstrate a claim of "Alter Ego" is without merit. (See Statement of Facts, Section IV)

### **1. The Committee Attempts To Circumvent Statutory Prohibitions Against Substantive Consolidation Of A Not "Moneyed" Entity.**

The Committee's Complaint, in its third cause of action, seeks a declaratory order for substantive consolidation "all Diocese Related Entities." The Committee's Motion for Summary Judgment now seeks a declaratory order under a theory of "Alter Ego." Such a legal theory is nothing more than a thinly veiled attempt to place Lourdes and other non-debtor/non-moneyed religious entities into an involuntary bankruptcy. Relief which is forbidden by the Code. See, 11 U.S.C. § 303(a) and corresponding legislative history. House Report No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess 321 (1977).

The Bankruptcy Code clearly recognizes that not all debtors are the same. And while Chapter 11 and its provisions do not generally distinguish between for-profit, non-profit, and religious organizations for the purposes of reorganization, that is not to say that

1 a distinction does not exist and should not or cannot be made. For example, under the  
2 Bankruptcy Code non-profit corporations are treated more favorably than for-profit  
3 organizations. See, e.g., 11 U.S.C. § 303(a) (excluding non-profit organizations from  
4 involuntary bankruptcy); 11 U.S.C. § 1112(c) (forbidding a court from converting a case  
5 filed by a non-profit from Chapter 11 to Chapter 7 without consent). Congress has  
6 recognized that religious organizations present unique bankruptcy issues because  
7 government regulation of religion implicates First Amendment rights. For example, the  
8 Bankruptcy Code has been modified by Congress to protect free exercise of religion to  
9 prevent a trustee from avoiding a debtor's donation given to a religious or charitable  
10 organization. See Religious Liberty and Charitable Donation Protection Act of 1998, Pub.  
11 L. No. 105-183, 112 Stat. 517 (1998).

12 Substantive consolidation has no express statutory basis, but rather, is a "product of  
13 judicial gloss." In re Augie/Restiro Bakery Co. Lt., 860 F.2d 515, 518 (2<sup>nd</sup> Cir. 1988).  
14 Substantive consolidation results in pooling the assets of, and claims against, the two  
15 entities, satisfying liabilities from the resultant common fund; eliminating inter company  
16 claims; and combining creditors of the two companies for purposes of voting on  
17 reorganization plans. In re Bonham, 229 F.3d 750, 764 (9<sup>th</sup> Cir. 2000).

18 In the present case, even if the Committee could get around the statutory  
19 prohibitions, the Committee would have to demonstrate 1) that the Committee or its  
20 members dealt with Lourdes Parish and the Debtor as a single economic unit and did not  
21 rely on the separate credit of each of the entities; or that the operations of the Debtor and  
22 Lourdes Parish were **excessively** entangled with the Debtor's affairs to the extent that  
23 consolidation will benefit all creditors. See In re Bonham, 229 F.3d 750, 766 (9<sup>th</sup> Cir.).

24 The newly surfaced "Alter Ego" theory is nothing more than a recognition that  
25 Committee's third cause of action has no application in this case.  
26

1 **G. Subjecting The Parish To Declaratory Relief of this Nature Violates First**  
2 **Amendment Rights Of Free Exercise And The Religious Freedom Restoration**  
3 **Act.**

4 The exercise of religion includes the "right to believe and profess whatever religious  
5 doctrine one desires" and prevents the government from "lendi[ng] its power to one side or  
6 another in controversies over religious authority or dogma." See Smith, 494 U.S. at 877  
7 (citations omitted). To protect the exercise of religion, the Supreme Court has held that if  
8 the government "substantially burdens" a person's exercise of religion, and the government  
9 does not demonstrate that it has a "compelling government interest" to justify the religious  
10 burden, then the government intrusion into a person's free exercise of religion has been  
11 violated. See Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, this Court later  
12 limited Sherbert by holding that "the right of free exercise does not relieve an individual of  
13 the obligation to comply with a 'valid and neutral law of general applicability . . .'" See  
14 Smith, 494 U.S. at 879 (citations omitted). Public opposition to the Smith holding was  
15 immediate and forceful. Congress enacted the Religious Freedom Restoration Act, 42  
16 U.S.C. § 2000bb-1 (1993)(hereinafter, RFRA), "to restore the compelling interest test as set  
17 forth in Sherbert," and "to guarantee its application in all cases where free exercise of  
18 religion is substantially burdened," including cases in which the law at issue was of "general  
19 applicability." See 42 U.S.C. § 2000bb(b)(1), (2). In Boerne v. Flores, 521 U.S. 507  
20 (1997), the Supreme Court declared RFRA unconstitutional as applied to state actions  
21 because Congress had exceeded the scope of its power under Section 5 of the Fourteenth  
22 Amendment in enacting the law. See Boerne, 521 U.S. at 527 (RFRA "intruded into an  
23 area reserved by the Constitution to the States"). However, RFRA continues to be  
24 constitutional as applied to federal law. See infra Part I.B.4.

25 Under RFRA, a neutral law of general applicability is an unconstitutional  
26 infringement of a person's free exercise rights if the following is true: (1) the law  
substantially burdens a person's exercise of religion; (2) the government cannot justify the  
law with a compelling government interest; and (3) there are no less restrictive means of  
furthering the government's compelling interest. 42 U.S.C. § 2000bb-1(a), (b).

1 Two unique circumstances arise would occur if the Court were to dictate the  
2 ownership and use of Parish property: (1) a religious leader will have been replaced by a  
3 government official as the head of a religious organization, resulting in comprehensive  
4 government surveillance of religion; and (2) a government official will be in an  
5 unprecedented position of decision making power over a church/Parish, a position  
6 traditionally given only to a spiritually mandated leader, the Pastor of the Parish, resulting in  
7 the appearance of government endorsement of religion for the benefit of a creditor's  
8 committee.

9 Lourdes' economic interests cannot be separated from its spiritual interest – any  
10 economic decision the Court makes regarding use or ownership of property inevitably has  
11 direct and significant religious consequences. Thus, the Court will become hopelessly  
12 entangled with religious policy of the Catholic Church. The effect of Lourdes' spiritual  
13 mission is that every financial decision it makes is driven by religious objectives toward  
14 religious ends in accordance with Canon Law. This creates an irreconcilable church versus  
15 state conflict between a non-debtor, a creditors committee, and the Court. By effectively  
16 forcing a Parish into bankruptcy by way of declaratory relief, the government is changing  
17 the essential structure of Lourdes under Canon Law. Since the Canon directs the religious  
18 vision and thus the financial objectives of Lourdes, such a change would essentially allow  
19 government to determine who benefits from Lourdes' mission.

## 20 VII.

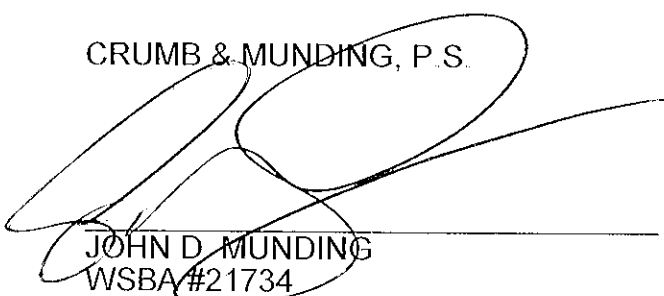
### 21 CONCLUSION

22 As a matter of law, the Committee has not established a case in controversy with  
23 Lourdes that would permit the declaratory relief requested. Even if the Court were to  
24 consider the pending motion for summary judgment based upon the Committee's factual  
25 theory, the Committee's motion fails as the Committee has failed to eliminate material  
26


1 questions of fact as to Lourdes' ownership interest in the real property, including furnishing  
2 all consideration for purchase, improvements, and maintenance.

3 DATED this 25<sup>th</sup> day of May, 2005.

4 CRUMB & MUNDING, P.S.

5  
6  
7   
8 JOHN D. MUNDING  
9 WSBA #21734

10 ELSAESSER JARZABEK ANDERSON  
11 MARKS ELLIOTT & MCHUGH

12   
13 FORD ELSAESSER  
14 BARRY McHUGH

15 Attorneys for Defendant Parishes

16 JDM\slc\p:files:assocparishes:summaryjudgment/25053  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26